RECORD AND BRIEFS

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No. 16-349

IN THE

Supreme Court of the United States

RICKY HENSON, ET AL.,

Petitioners,

v.

SANTANDER CONSUMER USA, INC.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL CONSUMER LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, TZEDEK DC, THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, AND CIVIL JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (the "FDCPA") has been a major focus of the work of NCLC. NCLC publishes *Fair Debt Collection* (8th ed. 2014), and *Collection Actions* (3d ed. 2014), comprehensive treatises to assist attorneys and debt collectors to comply with the law. This Court has relied upon *Fair Debt Collection* as supporting authority. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich,* 559 U.S. 573, 591 n.12 (2010).

National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice or area of study involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members and consumers in the ongoing struggle to curb unfair and oppressive business practices. Compliance with the FDCPA and faithful application of this law as Congress wrote it have been a continuing focus of NACA since its inception.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for both parties are on file with the Clerk.

Tzedek DC is an independent public interest legal aid center at the University of the District of Columbia David A. Clarke School of Law. Tzedek DC's mission is to safeguard the legal rights of low-income District of Columbia residents facing debt collection lawsuits and other consumer protection crises.

The Legal Aid Society of the District of Columbia (Legal Aid) was formed in 1932 to provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs. Today, Legal Aid is the oldest and largest general civil legal services provider in the District of Columbia. Legal Aid advocates on behalf of its clients to preserve affordable housing, ensure access to critical safety net benefits, protect consumer rights, and keep families safe and stable. As part of its consumer law practice, Legal Aid represents consumers in debt collection matters filed in District of Columbia courts, including many cases involving debt buyers. Through this on-the-ground work, Legal Aid attorneys regularly encounter consumers who have been subjected to a variety of abusive debt collection tactics, including unfair practices covered by the FDCPA.

Civil Justice is a non-profit public interest legal association founded in 1998 for the purpose of increasing the delivery of legal services to clients of low and moderate income while supporting a statewide network of solo, small-firm and community-based lawyers who share a commitment to increasing access to justice. Civil Justice and members of its attorney network regularly advise and represent consumers regarding debt buyers.

Having witnessed the abuses of unethical debt buyers, Civil Justice and its members are committed to maintaining the protections of the FDCPA for consumers against debt buyers.

SUMMARY OF ARGUMENT

The Fourth Circuit held that Respondent Santander Consumer USA Inc. ("Santander") was not subject to the FDCPA even though it regularly purchases consumer debt that is already in default and regularly attempts to collect on it. The ruling contravenes and now threatens to disrupt decades of interpretation of the FDCPA by regulatory authorities and courts which have held that a buyer of debt that is in default is a "debt collector" bound to comply with the prophylactic provisions of the FDCPA.

The Court of Appeals' ruling allowed Santander to escape the FDCPA by its narrow reading of the statutory definitional language "for another." The FDCPA defines "creditors" and "debt collectors." A "creditor" is "any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4). A "debt collector" is one "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). "Regularly" includes modest but integral collection activities. *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertollotti*, 374 F.3d 56 (2d Cir. 2004). A debt collector must be collecting a debt that was "in

default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii).

Santander was collecting the defaulted consumer accounts "for another" as assignee of the originating creditor. That is, Santander collected debt in the place of (for), or in lieu of (for), the originating creditor. This statutory language is entirely consistent with the long-established understanding that purchasers of defaulted debt must comply with the FDCPA, as any other covered "debt collector."

Santander was collecting a debt that it acquired after the consumer defaulted. Santander did not originate that debt. Santander was collecting for (in the shoes of) the originating creditor. Therefore, Santander is not an exempt creditor and must comply with the FDCPA.

The ruling below that a bad-debt purchaser is not subject to the FDCPA because the debt buyer is not seeking to collect "for another" (1) runs afoul of the principles of statutory construction; (2) is inconsistent with congressional intent and legislative history of the FDCPA; (3) is contrary to decades of guidance and enforcement actions by the federal agency responsible for enforcing the FDCPA; and (4) would exempt the entire debt buying industry and grant debt buyers a significant competitive advantage over other debt collectors whose collection efforts must comply with the FDCPA, which would "elevate form over substance and weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation." *Fed. Trade Comm'n v. Check Investors, Inc.*, 502 F.3d

159, 172–73 (3d Cir. 2007). A massive industry now exists of companies that have purchased hundreds of billions of dollars of defaulted consumer debt. As explained in detail below, the debt buying industry, which developed after the passage of the FDCPA, embodies the exact type of entity that Congress was attempting to regulate through the statute.

THE FAIR DEBT COLLECTION PRACTICES ACT

Congress passed the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices." 15 U.S.C. § 1692(a). These abusive debt collection practices, Congress observed in its findings, "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). Determining that existing laws were inadequate to address the problem, § 1692(b), Congress acted in order to "eliminate abusive debt collection practices," as well as "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).

In keeping with the purposes expressed in § 1692, the FDCPA regulates debt collection practices by both imposing affirmative requirements on debt collectors and prohibiting a wide range of conduct, *see, e.g.*, § 1692e (prohibiting the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt"); § 1692f (prohibiting the use of "unfair or unconscionable means to collect or attempt to collect any debt"); § 1692b (setting out the rules a debt

collector must follow for "acquiring location information" about the debtor).

Through the FDCPA, Congress "legislatively expressed a strong public policy disfavoring dishonest, abusive, and unfair consumer debt collection practices, and clearly intended the FDCPA to have a broad remedial scope." *Hamilton v. United Healthcare of La.*, 310 F.3d 385, 392 (5th Cir. 2002).[2]

While the FDCPA has improved debt collection industry practices, bad actors in that industry still generate more complaints than any other. Consumer Fin. Prot. Bureau, 2016 Fair Debt Collection Practices Act Annual Report 3 (2016).

ARGUMENT

I. THE FDCPA APPLIES TO DEBT BUYERS WHO PURCHASE DEFAULTED CONSUMER DEBTS

A. The Relevant FDCPA Definitions Are Ambiguous

The Fourth Circuit's conclusion that the meaning of the FDCPA is "clear" and that exclusions and exceptions to statutory definitions have no bearing on what the statute covers is illogical.

The definition of "ambiguous" is that words are reasonably susceptible of different interpretations. *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451,

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[2] *See Cirkot v. Diversified Fin. Sys., Inc.*, 839 F. Supp. 941, 944-47 (D. Conn. 1993) ("The FDCPA is based on the premise '[t]hat every individual, whether or not he owes [a] debt, has a right to be treated in a reasonable and civil manner.'" (quoting 123 Cong. Rec. 10241 (1977) (remarks of Rep. Frank Annunzio)).

473 n. 27 (1985). That there is a difference of opinion among the Courts of Appeal as to the meaning of words used in the definition of "debt collector" suggests that the competing readings may be reasonable.[3] Indeed, courts have noted that the coverage provisions of the FDCPA are "far from a model of drafting clarity," *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480, 1484 (MD. Ala. 1987), and "somewhat convoluted," *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106 (6th Cir. 1996).[4] To simply pick one of the competing viewpoints and declare that it is "clearly" the right answer is not helpful.

The notion that exceptions or exclusions in a statutory definition must be ignored in determining

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[3] *Boston Ins. Co. v. Gable*, 352 F.2d 368, 370 (5th Cir. 1965) ("we agree with the trial court's further conclusion that since the interpretation of this contractual language has been differently construed by courts of different jurisdictions," it is ambiguous, and therefore should be construed against the insurance company); *Lefrak Organization, Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 957 (S.D.N.Y. 1996) ("the range and variety of judicial opinions" deriving different meanings from the same language in a form insurance policy supports the conclusion that it is ambiguous, i.e., can reasonably be interpreted to mean different things).

[4] Many of the FDCPA definitions employ repetition to secure inclusiveness of coverage, making it impossible to simply insert a definition each time the defined word appears and have the FDCPA make sense. For example, the definitions of "consumer" and "debt" in §§ 1692a(3) and (5) are repetitive: "consumer" means "any natural person obligated or allegedly obligated to pay any debt," and "debt" means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."

what is covered by the basic definition also has little to commend it. The fact that Congress found it necessary to except or exclude a subject certainly suggests that the subject would be covered by the basic statutory definition absent the exception or exclusion. *Fort Stewart Schools v. Fed. Labor Relations Authority,* 495 U.S. 641, 646 (1990) (Scalia, J.).

"[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, [t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotation marks and citation omitted). A statute should be construed so that effect is given to all its provisions, and no part is made superfluous. *Hibbs v. Winn*, 542 U.S. 88 (2004). "The rule against superfluities complements the principle that courts are to interpret the words of a statute in context." *Hibbs*, 542 U.S. at 124.

B. The FDCPA Covers Debt Buyers

The FDCPA generally applies to "debt collectors." 15 U.S.C. § 1692k(a). With certain exceptions, the FDCPA covers the actions of debt collectors, rather than creditors, because Congress concluded that "[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95–382, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 1695, 1696.

The FDCPA defines a "debt collector" in part as:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6). Among other exclusions, the term does not apply to "any person collecting or attempting to collect any debt owed ... or due another to the extent such activity ... concerns a debt that was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). "Creditor" is defined as "any person who offers or extends credit creating a debt or to whom a debt is owed," but excludes "any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4) (the "Assignee Exception").

Several Circuits hold that the operative question for the purposes of determining whether an entity is a "creditor" or "debt collector" is the status of the debt at the time it was acquired. *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717 (5th Cir. 2013); *Bridge v. Ocwen Fed. Bank*, 681 F.3d 355, 359 (6th Cir. 2012); *Fed. Trade Comm'n v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. 2007); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985).

Put simply, "the Act treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not." *Schlosser,* 323 F.3d at 536; *accord Bridge*, 681 F.3d at 359; *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496 (7th Cir. 2008); *Check Investors*, 502 F.3d at 173.

In *McKinney v. Cadleway Properties*, 548 F.3d 496 (7th Cir. 2008), the Seventh Circuit explained that the Act draws the distinction "by the *exclusionary* language . . . in the statutory definitions of creditor and debt collector":

> That is, the definition of creditor excludes those who acquire and attempt to collect a "debt *in default,*" § 1692a(4) (emphasis added), while the definition of debt collector excludes those who acquire and attempt to collect "a debt which was *not in default* at the time it was obtained," §1692a(6)(F) (emphasis added). So one who acquires a "debt in default" is categorically *not* a creditor; one who acquires a "debt not in default" is categorically *not* a debt collector.

Id. at 501. In other words, the "second subcategory of debt collectors," *i.e.* those who regularly collect debts owed or due another, "refers back to a group specifically *excluded* from the Act's definition of creditors–those who receive "an assignment or transfer of a debt in default" for the purpose of "facilitating [the] collection of such debt for another." *Id.* at 500.

When read in isolation, the Assignee Exception appears nonsensical. "[A]n assignment is

generally defined as the 'transfer by a party of all of its rights to some kind of property, usually intangible[.]'" *Kimber*, 668 F. Supp. at 1485 (quoting Black's Law Dictionary, 5th Ed., p. 109). The notion of an assignee who acquires a debt after default but is not collecting for itself does not make sense. However, when read in context and with the directive to avoid rendering statutory language meaningless, the meaning becomes clear:

> To say that this exception applies only to those who collect debts for others would be to render the exception superfluous and meaningless; those who collect debts for others are not in the original definitional universe, and there is therefore no need to exclude them. Rather, the excluding factors in the exception are that the debts are the result of an assignment or transfer and that the debts were already in default at the time of assignment or transfer. With the phrase 'for another' at the end of the exception, Congress merely intended that the debts should have originally belonged to another and that the creditor was therefore in effect a third-party or independent creditor.

Kimber v. Federal Fin. Corp., 668 F. Supp. 1480, 1485 (MD. Ala. 1987).

The phrase "owed or due another" in the definition of "debt collector" in § 1692a(6) only makes sense if the phrase is interpreted to mean *originally* owed or due another. Judge Thompson explained:

> [T]he first part of § 1692a(4) defines the universe of creditors as those who collect debts for themselves. Section 1692a(6)(A) purports to exclude these creditors from the general definition of debt collector. There would be no need to exclude creditors—those who collect debts for themselves—from the general definition of debt collector unless that general definition included those who collect debts for themselves.

Id.

C. Coverage of Buyers of Defaulted Debt Is Consistent With the Purpose of the FDCPA

Once it is recognized that an ambiguity exists, consideration of the purpose of the FDCPA in resolving it is appropriate. *Suesz v. Med-1 Solutions, L.L.C.*, 757 F.3d 636, 646–49 (7th Cir. 2014) (en banc) (purposive construction of the FDCPA is appropriate).

The interpretation that purchasers of debts in default are covered is consistent with the manifest purpose of the FDCPA. As explained by the Seventh Circuit in *McKinney:*

> We have held that "[f]or purposes of applying the Act to a particular debt, these two categories-debt collectors and creditors-are mutually exclusive." *Schlosser,* 323 F.3d at 536. We have also observed, however, that "for debts that do not originate with the one attempting collection, but are acquired

from another, the collection activity related to that debt could logically fall into either category." *Id. Schlosser* noted that in such a case-one involving a debt originated by another and subsequently acquired by the entity attempting collection-"the Act uses the status of the debt at the time of the assignment" to distinguish between a debt collector and a creditor. *Id.*

The Act draws this distinction in a rather indirect way, however-by the exclusionary language, quoted above, in the statutory definitions of creditor and debt collector. That is, the definition of creditor excludes those who acquire and attempt to collect a "debt in default," § 1692a(4) (emphasis added), while the definition of debt collector excludes those who acquire and attempt to collect "a debt which was not in default at the time it was obtained," § 1692a(6)(F) (emphasis added). So one who acquires a "debt in default" is categorically not a creditor; one who acquires a "debt not in default" is categorically not a debt collector.

Thus, we held in *Schlosser* that the Act "treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not." 323 F.3d at 536; *see also Bailey v. Sec. Nat'l Servicing Corp.*, 154 F.3d 384, 387 (7th Cir. 1998) ("The plain language of

§ 1692a(6)(F) tells us that an individual is not a 'debt collector' subject to the Act if the debt he seeks to collect was not in default at the time he purchased (or otherwise obtained) it."). We explained that "[f]ocusing on the status of the obligation asserted by the assignee is reasonable in light of the conduct regulated by the statute," which generally covers debt collection, not debt servicing:

> For those who acquire debts originated by others, the distinction drawn by the statute-whether the loan was in default at the time of the assignment-makes sense as an indication of whether the activity directed at the consumer will be servicing or collection. If the loan is current when it is acquired, the relationship between the assignee and the debtor is, for purposes of regulating communications and collection practices, effectively the same as that between the originator and the debtor. If the loan is in default, no ongoing relationship is likely and the only activity will be collection. . . .

McKinney, 548 F.3d at 501, citing *Schlosser*, 323 F.3d at 538.

Accordingly, the purchaser of a debt in default is a debt collector for purposes of the FDCPA even though it owns the debt and is collecting for itself. *Id.* at 538–39; *see also Fed. Trade Comm'n v. Check Investors, Inc.*, 502 F.3d 159, 171–74 (3d Cir. 2007) (holding that an entity engaged in collection activity on a defaulted debt acquired from another is a "debt collector" under the FDCPA even though it "may actually be owed the debt").

Thus, these courts read the definition of "debt collector" in § 1692a(6) in conjunction with the definition of "creditor" in § 1692a(4) to find that a debt collector includes entities who regularly collect defaulted debts on behalf of their owner, as well as entities who acquire and collect defaulted debts for their own account. The word "for" can mean "in place of" and "with respect to" as well as "on behalf of." Merriam-Webster.com (May 7, 2015), http://www.merriam-webster.com/dictionary/for. Accordingly, a debt buyer is collecting "for" (in the shoes of) another—the originating creditor.

Santander attempts to focus on a clause in isolation and give it a meaning that is at odds with its context, as well as the purpose of the FDCPA. However, "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "[O]ne cannot take a clause out of context and give it a meaning which is inconsistent with the overall purpose of the legislation. Rather, if the definitional section is ambiguous our effort should be to interpret it in a manner which preserves rather than destroys the legislative purpose." *Holmes v.*

Telecredit Serv. Corp., 736 F. Supp. 1289, 1292–93 (D. Del. 1990).

Thus, as the court in *Holmes* stated:

> By use of the language "owed or due another" Congress was attempting to exclude those entities that extend credit from the effects of the Act. Congress intended to protect borrowers from "third persons who regularly collect debts for others." [Defendant] is a third party collecting a debt originally owed to another. . . . It cannot escape the spirit of the Act by the technicality of purchasing the debt upon default so that title technically rests in itself.

736 F. Supp. at 1293 (internal citations omitted).

This reading also comports with the principle that exemptions to remedial statutes are to be narrowly construed. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (interpreting exceptions to the remedial FLSA narrowly); *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 559 (6th Cir. 2006) ("Following traditional canons of statutory interpretation, remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly."); *Caprio v. Healthcare Revenue Recovery Grp., L.L.C.*, 709 F.3d 142, 148 (3d Cir. 2013) ("As remedial legislation, the FDCPA must be broadly construed in order to give full effect to these purposes"); *Johnson v. Riddle*, 305 F.3d 1107, 1117 (10th Cir. 2002) (explaining that because the FDCPA is a remedial statute, it is construed liberally in

favor of the consumer); *Olsen v. Lake Country, Inc.*, 955 F.2d 203, 206 (4th Cir. 1991) ("[E]xemptions from remedial statutes are to be construed narrowly"). Entities that purchase and collect defaulted consumer debts are clearly within the scope of what Congress intended to regulate when it enacted the statute. As explained below, this reading is made clearer by the legislative history. Accordingly, Santander is a debt collector under the FDCPA.

D. The Legislative History and Purpose of the FDCPA Compel the Conclusion That Purchasers of Defaulted Consumer Debts Are Debt Collectors under the FDCPA as to Such Debts

The holding of the appellate courts that have considered the issue is consistent with the legislative history of the FDCPA. In particular, a debate over a proposed amendment in the Senate committee that drafted the FDCPA clearly supports those holdings. Senate Comm. on Banking, Housing & Urban Affairs, Markup Session: S. 1130 Debt Collection Legislation 2–3 (June 30, 1977).

The FDCPA was drafted by the Senate Committee on Banking, Housing & Urban Affairs based on a combination of bills, but primarily H.R. 5294, 95th Cong. (1977). *See* S. Rep. No. 95–382, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1695, 1696. Before the Senate Committee's changes, H.R. 5294 contained a very simple definition of debt collector with exceptions only for governments and lawyers. The phrase "debt collector" meant "any person who engages in any business the principal purpose of which is the collection of any debt, or any

person who directly or indirectly collects or attempts to collect a debt owed or due or asserted to be owed or due another, and who uses any instrumentality of interstate commerce in connection with such collections." The exceptions, including the Assignee Exception, were added in by the Senate Committee.

After the Senate Committee made its changes, the Committee held two markup hearings on the bill. During the first mark-up hearing, Senator Schmitt proposed an amendment that would exempt banks and retail organizations engaged in debt collection through "reciprocal collection arrangements," which were common in the banking industry at the time. Senate Comm. on Banking, Housing & Urban Affairs, Markup Session: S. 1130 Debt Collection Legislation 16 (1977). In a reciprocal collection arrangement, a local bank agreed to collect defaulted debts of debtors who moved to the local bank's area for another bank that did not have a local presence, in exchange for reciprocal treatment for customers that moved to the other bank's territory. *Id.* at 18.

Mr. Lewis Taffer, the Committee counsel, explained why the proposed amendment was undesirable: "[T]he reason the Committee print specifically would cover reciprocal agreements is because the philosophy of this bill is to cover all situations in which third parties who have been unrelated to the original debt come on to the scene for the first time to collect a delinquent debt." *Id.* at 17-18.

Senator Riegle, the sponsor of the bill, added, "the concern about third parties, whether they be banks or anybody else that put themselves in business to collect debts where they were not a party

to the original transaction, their good will is not on the line, their customer relationship is not on the line." *Id.* at 23. He continued:

> When you are collecting a debt that you had no involvement in the origination of, you are taking it on as a third party, that you are expected to follow the same ethical practices that everybody else in this business follows because you are electing to become a third-party debt collector.

Id. at 24.

A particularly telling exchange then occurred. The chairman of the Committee observed that if banks were exempted, there would be "unfair competition" because small collectors would be regulated and banks would not. *Id.*, at 24-25. Senator Morgan, a proponent of the amendment, responded: "Mr. Chairman, I don't believe you can find a bank in America that wants to get into the debt collection business of the kind we are talking about. I don't know of any that collect any debts other than for themselves except a reciprocal situation." *Id.* at 25. Senator Riegle forcefully responded:

> All we do here are prohibit practices that ought to be prohibited. As you say, any self-respecting bank that wants to get into the debt collection business, collecting from people who are not their customers but somebody else's customers, if they want to take themselves into that business that is their decision. If they do, then they

> would fall within the scope of living within the same bounds of ethical practices that everybody else in the debt collection business is in.

Id.

The proposed amendment was defeated. *Id.* at 55. Indeed, the Committee Report specifically noted that "[t]he definition of [debt collector] would include 'reciprocal collections.'" S. Rep. No. 95–382, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1695, 1696.

As the debate over the proposed amendment illustrates, Congress aimed to prevent any party from "collect[ing] from people who are not their customers but somebody else's customers" without adhering to "the same bounds of ethical practices that everybody else in the debt collection business is in." Senate Comm. on Banking, Housing & Urban Affairs, Markup Session: S. 1130 Debt Collection Legislation 25 (1977). Congress intended the FDCPA to apply to parties who "were not a party to the original transaction" because "their good will is not on the line, their customer relationship is not on the line." *Id.* at 23. Although the FDCPA was passed before the rise of the debt buying industry that exists today, Congress did not intend to allow an entity such as a debt buyer to unfairly compete with other debt collectors by avoiding the ethical standards that were being established in the FDCPA. *See id.* at 25. Congress' intent was to "cover all situations in which third parties who have been unrelated to the original debt come on to the scene for the first time to collect a delinquent debt," thus

precisely including debt buyers such as Santander here. *Id.* at 17-18.

Courts agree that the legislative history of the FDCPA firmly reinforces this conclusion. In the words of *Kimber*: "With §§ 1692a(4) and 1692a(6)(A), Congress clearly sought to exclude creditors—that is, those who extend credit and collect their own debts—from the Act's coverage; such persons are, in the words of the Senate Report, 'restrained by the desire to protect their good will.'" 668 F. Supp. at 1486. On the other hand,

> [W]hen these so-called creditors are in effect merely in the business of collecting stale debts rather than extending credit, they are no longer true creditors but debt collectors who, in the words of the Senate Report, 'are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them'; they are simply independent collectors of past due debts and thus clearly fall within the group Congress intended the Act to cover.

Id. See also, e.g., Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985) ("The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company or an assignee of a debt, as long as the debt was not in default at the time it was assigned."); *Ademiluyi v. PennyMac Mortg. Inv. Trust Holdings I, L.L.C.,* 929 F. Supp. 2d 502, 525 (D. Md. 2013) (noting that the logic behind the Act's

legislative history "extends to the debt purchaser context").

Thus, the overwhelming weight of authority is consistent with the position that a bad debt buyer who acquires defaulted debt to collect for (in the place of) another falls within the definition of "debt collector" under the FDCPA.

E. The Federal Agencies Charged with Enforcing the FDCPA Have Consistently Agreed That Purchasers of Defaulted Consumer Debts Are Subject to the FDCPA

The Federal Trade Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB"), which share enforcement authority with respect to the FDCPA, have endorsed the view that purchasers of defaulted consumer debts are "debt collectors" under the FDCPA.[5]

In *Fed. Trade Comm'n v. Check Investors, Inc., supra*, 502 F.3d at 171–74, the FTC successfully argued that an entity engaged in collection activity on a defaulted debt acquired from another is a "debt collector" under the FDCPA even though it "may actually be owed the debt":

> Admittedly, focusing on the status of the debt when it was acquired overlooks the fact that the person engaging in the collection activity may actually be owed the debt and is, therefore, at least nominally a creditor. Nevertheless,

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[5] As explained below, the CFPB also is authorized to promulgate rules under the FDCPA governing debt collection practices.

> pursuant to § 1692a, Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA. The legislative history explains the wisdom of that provision. The term "debt collector," subject to the exclusions discussed below, was intended to cover all third persons who regularly collect debts. "The primary persons intended to be covered are independent debt collectors." S. Rep. No. 95-382, at 2, 1997 U.S.C.C.A.N. at 1697. The Senate Committee explained that the FDCPA was limited to third-party collectors of past due debts because, unlike creditors, "who generally are restrained by the desire to protect their good will when collecting past due accounts," independent collectors are likely to have "no future contact with the consumer and often are unconcerned with the consumer's opinion of them." *Id.* at 1696.

Fed. Trade Comm'n v. Check Investors, Inc., 502 F.3d at 173.

More recently, the FTC filed an amicus brief in support of rehearing in *Davidson v. Capital One Bank,* 797 F.3d 1309 (11th Cir. 2015), arguing that a purchaser of defaulted debts is a "debt collector."[6]

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[6] https://www.ftc.gov/system/files/documents/amicus_briefs/keith-davidson-v.capital-one-bank-usa-n.a./150921davidsonamicusbrief.pdf

This has been the FTC's position for over 20 years. As explained in a 1993 FTC staff opinion letter, "a party that purchases delinquent accounts from the party to which the debts were originally owed and attempts to collect them from the consumer debtors fits clearly within [the definition of debt collector]." Letter from Clarke W. Brinckerhoff to Kimberlee Arbuckle (Dec. 22, 1993), FTC Informal Staff Opinion Letter, 1993 WL 13148377 (F.T.C.).[7] According to the Opinion Letter, "[t]he party is attempting to collect debts that were 'owed or due another' and the fact that title to the accounts is passed to the collector in no way changes that fact." *Id.* The Opinion Letter continued:

> The words "for another" at the end of the clause excepting assignees from the definition of creditor in no way changes this result:
>
> > [T]he excluding factors in the exception are that the debts are

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[7] In *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000), the Supreme Court explained that interpretations such as those in opinion letters are not entitled to *Chevron*-style deference, but they are "entitled to respect" to the extent that the interpretation has the "power to persuade." *See also United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (explaining that "an agency's interpretation may merit some deference whatever its form"); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (recognizing that interpretations and opinions of administrative agencies, even "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."). A number of courts have found FTC letters to be persuasive and given them weight when interpreting the FDCPA. *See, e.g.*, *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142, 1147 (9th Cir. 1998).

> the result of an assignment or transfer and that the debts were already in default at the time of assignment or transfer. With the phrase "for another" at the end of the exception, Congress merely intended that the debts should have originally belonged to another and that the creditor was therefore in effect a third-party or independent creditor. (Italics by court).
>
> *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480, 1485 (M.D. Ala. 1987). Accord, *Holmes*, *supra*, at 1293.
>
> In sum, it is our view that a party that obtains consumer obligations in default for the purpose of collection is a "debt collector" under the FDCPA, even if that party actually purchases the accounts from the original creditor.

Id.

This interpretation is also in accord with the FTC's Staff Commentary on the FDCPA, which explained that the FDCPA's definition of "creditor" "includes the party that actually extended credit or became the obligee on an account in the normal course of business, and excludes a party that was assigned a delinquent debt only for collection purposes." Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097-02, 50,101-02 (1988). Thus, the FTC consistently has

taken the view that an entity that purchases a debt in default is a debt collector under the FDCPA.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the CFPB in 2011, charged the agency with shared oversight and enforcement responsibilities for the FDCPA. Pub. L. No. 111-203, § 1089(3) (2010), amending 15 U.S.C. § 1692*l*(a). In addition, the Dodd-Frank Act granted rulemaking authority under the FDCPA to the CFPB, making it the first federal agency to possess the authority to issue substantive rules for debt collection under this statute. Pub. L. No. 111-203, § 1089(4) (2010), amending 15 U.S.C. § 1692*l*(d).

On November 12, 2013, the CFPB filed an advance notice of proposed rulemaking in the Federal Register soliciting comments and information to assist the agency in developing proposed rules for debt collection. Bureau of Consumer Financial Protection, Advanced Notice of Proposed Rulemaking of November 12, 2013, Debt Collection (Regulation F), 78 Fed. Reg. 67,848-01. The CFPB unequivocally indicates that debt buyers are to be covered under the regulations. *See id.*

In July 2016, the CFPB published *Collector and Debt Buyer Rulemaking, Outline of Proposals under Consideration And Alternatives Considered*,[8] which expressly states (p. 4) that debt purchasers are covered: "The proposals under consideration discussed below would apply to small entities in the following categories for debts acquired in default: collection agencies, debt buyers, collection law firms, and loan servicers."

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[8] http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf

Other FTC and CFPB materials also evidence the agencies' understanding that debt buyers are included within the FDCPA's coverage. *See, e.g.*, January 30, 2013 FTC report, *The Structure and Practices of the Debt Buying Industry*," at pp. 3–4, *available at* www.ftc.gov/os/2013/01/debtbuying report.pdf ("Some debt buyers have argued that because they collect debts they own, not debts others own, the FDCPA does not govern their activities because they are creditors. In the seminal decision in *Kimber v. Federal Fin. Corp.*, the court rejected that argument, holding that debt buyers that seek to recover on debts that were in default when the debt buyers acquired them are debt collectors for purposes of the FDCPA. Since *Kimber*, many other courts have concluded that such debt buyers are debt collectors for purposes of the FDCPA"); FTC Report, *Collecting Consumer Debts: The Challenges of Change*, p. 5 (2009), *available at* www.ftc.gov/bcp/ workshops/debtcollection/dcwr.pdf ("The FDCPA applies to third-party 'debt collectors,' a term that includes contingency agencies, collection law firms, and debt buyers, but generally does not include creditors' in-house collectors. Congress's rationale for applying the statute only to third-party collectors was that, '[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them.'"); FTC Report, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration,* p. 6 n. 15 (2010), *available at* www.ftc.gov/os/2010/07/ debtcollectionreport.pdf.

("Debt buyers–persons who collect debt on their own behalf that they have purchased from creditors or debt collectors–are covered by the FDCPA if the accounts were in default at the time the debt buyers purchased them. FDCPA §§ 803(4), 803(6); 15 U.S.C. §§ 1692a(4), 1692a(6)"); Consumer Financial Protection Bureau, 2013 Fair Debt Collection Practices Annual Report 4 n.14 (2013) ("'Third-party debt collectors' include . . . debt buyers collecting on debts they purchased in default"), *available at* http://files.consumerfinance.gov/f/201303_cfpb_ March_FDCPA _Report1.pdf.

And, as highlighted below, this understanding of the Act's coverage is reflected in the various enforcement actions that the FTC and CFPB have brought under the FDCPA against debt buyers. *See, e.g., Fed. Trade Comm'n v. Check Investors, Inc.*, 502 F.3d at 172–74.

Moreover, Congress has acquiesced in the consistent administrative construction of the FDCPA as covering purchasers of defaulted debt who collect for their own account. The FDCPA is not an obscure enactment that escapes Congressional attention–it has been amended not fewer than 7 times since *Kimber*. (1) Pub. L. No. 111-203, Title X, §1089(2), July 21, 2010, 124 Stat. 2092. (2) Pub. L. No. 109-351, Title VIII, § 802, Oct. 13, 2006, 120 Stat. 2006. (3) Pub. L. No. 104-208, Title II, §2305(a), Sept. 30, 1996, 110 Stat. 3009-425. (4) Pub. L. No. 104-88, Title III, § 316, Dec. 29, 1995, 109 Stat. 949. (5) Pub. L. No. 102-550, Title XVI, § 1604(a)(8), Oct. 28, 1992, 106 Stat. 4082. (6) Pub. L. No. 102-242, Title II, § 212(e), Dec. 19, 1991, 105 Stat. 2301. (7) Pub. L. No. 101-73, Title VII, § 744(n), Aug. 9, 1989, 103 Stat. 440. At no time has Congress rejected the

consistent construction of the FTC and the CFPB that purchasers of defaulted debts are covered.

F. The Fourth Circuit's Position Has Broad Implications for the Massive and Growing Debt Buyer Industry

The conclusion that the FDCPA applies to debt buyers makes particular sense in light of the massive growth of the debt buying industry since the FDCPA was passed in 1977. "The practice of creditors selling consumer debts on a large scale has its origins in the savings and loan crisis of the late 1980s and early 1990s." Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry 12 (2013) *available at* www.ftc.gov/os/2013/01/debtbuyingreport.pdf (hereinafter, "Structure and Practices"). The debt buying industry has rapidly grown since. According to Robert M. Hunt's presentation at the Consumer Financial Protection Bureau and Federal Trade Commission's Joint Roundtable Discussion, "Understanding the Model: The Life Cycle of a Debt" (June 6, 2013), slide 19[9] shows that hundreds of billions of dollars of consumer debt has been sold to debt buyers:

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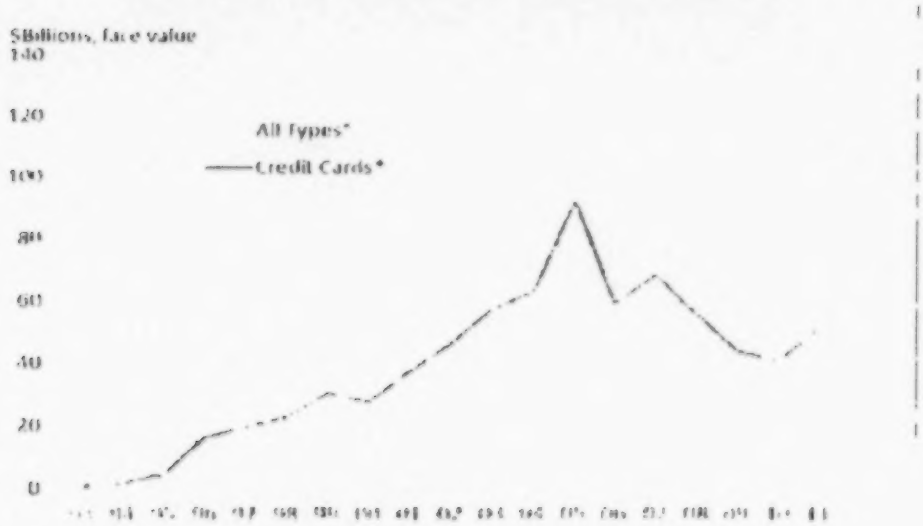
[9] https://www.ftc.gov/sites/default/files/documents/public_events/life-debt-data-integrity-debt-collection/understandingthemodel.pdf

Sales of Consumer Debt in Default



The large amount of money involved has attracted numerous new entrants into the debt buying business. In 2010, the Wall Street Journal reported that "[m]ore than 450 debt buyers scooped up an estimated $100 billion in distressed loans last year." Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—In Lawsuits*, WALL ST. J., Nov. 29, 2010, at A1, *available at* http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html. As noted above, most of these debts are purchased for pennies on the dollar, if not less. *See, e.g., Gonzales v. Arrow Fin. Services, L.L.C.*, 660 F.3d 1055, 1059 n. 1 (9th Cir. 2011); Consumer Fin. Prot. Bureau, Market Snapshot: Online Debt Sales 5 (2017) ("The three online marketplaces reviewed offered 298 portfolios with an aggregate face value of almost $2 billion and an aggregate asking price of roughly $18 million. These portfolios include at least 1.2 million accounts, each of which may contain

> consumers' personal information. The average asking price per dollar of face value is just under one cent. More than one hundred of the portfolios had asking prices of $0.004 (or 0.4¢) or less per dollar. There are some portfolios, including one with a face value of $156 million on sale for $125,000, which had asking prices lower than $0.001 (or 0.1¢) per dollar.").

The FTC reported in 2013 that "there now appear to be hundreds, if not thousands, of entities of varying sizes that purchase debts." Structure and Practices 14. And, as noted by the FTC in Structure and Practices, the practices of smaller debt buyers "are a frequent source of consumer protection concerns." *Id.* at i. Many of these consumer protection concerns stem from the limited information that is actually transferred at the time of the purchase of the defaulted debts; the FTC found that debt buyers typically "obtained very few documents related to the purchased debts at the time of sale or after purchase." *Id.* at iii. The FTC also found that debt buyers only receive documentation for approximately 12% of the debts they attempt to collect. *Id.* at 35. This creates an environment that is ripe for abuse.

Indeed, there are numerous examples of the FDCPA being used to curb abuses by unethical debt buyers. In 2004, the FTC filed a complaint against Capital Acquisitions and Management Corp. ("CAMCO"), its subsidiary and its principals after CAMCO "engaged in systematic and widespread violations of the [FDCPA]." *See* Press Release, Federal Trade Commission, Debt Buyer/Debt Collection Companies and Their Principals Settle FTC Charges (Mar. 24, 2004), *available at*

https://www.ftc.gov/news-events/press-releases/2004/03/debt-buyerdebt-collection-companies-and-their-principals-settle. As the FTC stated, "CAMCO is a 'debt buyer'–a company that buys old debts well past the statute of limitations and attempts to collect them." *Id.* Among other violations, CAMCO's collectors threatened consumers with arrest, used profanity, called consumers at their workplaces and refused to heed the consumers' requests to stop calling. *Id.* Indeed, CAMCO engaged in similar misconduct even after settling the FTC's initial lawsuit, ultimately being shut down by a court-appointed receiver later that year when the violations continued. *See* Press Release, Federal Trade Commission, Debt Collector Settles with FTC for Abusive Practices (Mar. 12, 2007), *available at* https://www.ftc.gov/news-events/press-releases/2007/03/debt-collector-settles-ftc-abusive-practices.

Similarly, the Third Circuit remarked of the defendant debt buyer in *Check Investors*, 502 F.3d at 172–73, that "[n]o merchant worried about goodwill or the future of his/her business would have engaged in the kind of conduct that was the daily fare of the collectors at Check Investors." *Check Investors*, 502 F.3d at 174. That debt buyer's "primary *modus operandi* was to accuse consumers of being criminals or crooks, and threatening them with arrest and criminal or civil prosecution." *Id.* at 163. The Third Circuit found that "[t]he collectors working there resorted to whatever harassment appeared likely to succeed; the only limit appears to have been a given tactic's likelihood of bearing fruit by yielding a profit." *Id.* at 174.

In short, a massive industry now exists of hundreds or thousands of companies buying

approximately one hundred billion dollars of defaulted consumer debt annually in the United States that embodies the exact relationship to consumers that creates the opportunities for abuse that Congress intended to prevent with the FDCPA. Yet Santander's position would exempt a whole class of debt buyers from the FDCPA. Santander's reasoning, if adopted, would open a massive loophole in the FDCPA "big enough to devour all of the protections Congress intended in enacting that legislation," and would grant debt buyers a competitive advantage over other debt collectors that would cause an even larger growth in debt buying. *Check Investors*, 502 F.3d at 172–73.[10]

The only reasonable and consistent construction of the FDCPA that is consistent with its intended purpose is that persons who acquire and collect debts (1) are "debt collectors" with respect to those debts which are purportedly in default at the time they are acquired, whether they regularly or principally acquire such debts but (2) are not debt collectors with respect to current debts.

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[10] If the Court adopts Santander's bottom line position, the scope of its holding should nonetheless exclude debt buyers that have a "business the principal purpose of which is the collection of any debts." 15 U.S.C. § 1692a(6). The FDCPA uses disjunctive "or" language in its definition of debt collector. The first "principal purpose" clause includes no limitation that the debt be "due another." *Id.* The vast segment of the debt industry that exists solely to purchase and collect debt, therefore, should remain untouched by an opinion based on the second clause of the definition.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Fourth Circuit's decision in this matter be reversed.

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